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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

[GENERAL OVERSIGHT]

Decision No. 18

Decided: February 23, 2005

In a decision served October 20, 2004,[1] we found that the "Conrail Transaction" that is the subject of this proceeding had not resulted in competitive or market power problems, and we concluded the Board's formal, 5-year oversight process as scheduled. By petition for reconsideration filed November 9, 2004, the Department of Community and Economic Development (DCED) of the Commonwealth of Pennsylvania asks that we clarify certain language in that decision relating to whether the carriers that acquired Conrail have complied with all of the commitments they made in two 1997 letter agreements. While we will not reconsider that decision, we will address and clarify the particular statement that concerns DCED.

BACKGROUND

In 1998, the Board authorized the CSX[2] and Norfolk Southern[3] (NS) railroads to acquire Conrail Inc. and Consolidated Rail Corporation (collectively, Conrail), subject to various conditions designed to ensure that the transaction would not result in competitive or market power problems.[4]

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[1] CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation [General Oversight], STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 17 (STB served Oct. 20, 2004) (Oversight Dec. No. 17).

[2] CSX Corporation and CSX Transportation, Inc.

[3] Norfolk Southern Corporation and Norfolk Southern Railway Company.

[4] CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196 (1998) (Merger

(continued...)

One of those conditions directed CSX and NS to honor the representations they made during the course of the proceeding.[5] The Board also provided for general Board oversight for 5 years to monitor implementation of the transaction and the workings of the conditions, and the agency retained jurisdiction to impose additional conditions and/or to take other action as necessary.[6]

In January 2004, the Board announced the fifth annual round of oversight,[7] and in February 2004, the Board scheduled two public hearings to afford interested parties an opportunity to express their views with regard to any matter connected with the Conrail Transaction.[8] The public hearings were held in Trenton, NJ, on April 2, 2004, and in Washington, DC, on May 3, 2004, and written comments, to which CSX and NS jointly replied, were subsequently filed by interested parties.

In testimony and written comments, DCED and the Philadelphia Industrial Development Corporation (PIDC) argued that oversight should be extended for another 5 years because CSX and NS had failed to comply fully with the representations they had made in two letter agreements with the Governor of Pennsylvania and the Mayor of Philadelphia.[9] While conceding that CSX and NS had complied with most of their commitments,[10] DCED and PIDC pointed to four areas in which, they alleged, the carriers had come up short. Specifically, they charged that (1) both carriers have failed to invest sufficient sums in rail-related economic development programs in Philadelphia and across Pennsylvania; (2) both carriers have failed to invest sufficient sums in incentive programs to encourage rail-oriented industry to locate in Philadelphia and across Pennsylvania; (3) NS has failed to complete three of the four particular Philadelphia-area capital improvement projects it had planned; and (4) both

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[4](...continued)
Dec. No. 89), clarified and modified (Decision No. 96) (STB served Oct. 19, 1998), aff'd sub nom. Erie-Niagara Rail Steering Comm. v. STB, 247 F.3d 437 (2d Cir. 2001).

[5] See Merger Dec. No. 89, 3 S.T.B. at 387, ¶ 19 ("[CSX and NS] must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision.").

[6] See id. at 217 (item 38), 365-66, 385 (¶ 1).

[7] CSX Corp. et al. — Control — Conrail Inc. et al., STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 11 (STB served Jan. 21, 2004) (Oversight Dec. No. 11).

[8] CSX Corp. et al. — Control — Conrail Inc. et al., STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 12 (STB served Feb. 12, 2004) (Oversight Dec. No. 12), published at 69 FR 7664-66 (Feb. 18, 2004).

[9] See Merger Dec. No. 89, 3 S.T.B. at 509, 511; Oversight Dec. No. 17, slip op. at 55-59.

[10] Oversight Dec. No. 17, slip op. at 17.

carriers have failed to maintain railroad employment in the Philadelphia area at projected levels. CSX and NS responded to these claims, asserting that they have substantially complied in good faith with the commitments they made in the letter agreements, and indeed have exceeded them in many respects.[11]

In Oversight Dec. No. 17, we concluded that DCED and PIDC had not made their case for an extension of oversight. As to the claim about economic development programs, we noted that both CSX and NS had invested substantial sums in Pennsylvania area infrastructure and were continuing to do so.[12] As to the claim about incentive programs to encourage rail-oriented industry to locate in the area, we found that the letter agreements did not impose unqualified funding requirements on the carriers for projects designated by others, and that, in any event, rail business had not reached levels that the parties had agreed would be necessary to trigger such funding.[13] As to the four Philadelphia-area capital improvement projects, we noted that NS's letter agreement had stated only that the indicated facilities were included in the operating plan that NS had filed with the Board, which, we pointed out, provided a general outline of a carrier's plan, not a carved-in-stone commitment.[14] And as to employment levels, we explained that, as economic circumstances change, railroads, like other businesses, must be able to make operational and financial adjustments, including adjustments in employment levels. We observed that, while the number of rail jobs in Philadelphia may not be at the projected levels, rail jobs in other areas of Pennsylvania are above projected levels (for instance, at NS's new hub in Harrisburg), and other employment increases within Pennsylvania have been spurred by the railroads' investments (for example, 1,000 new jobs associated with the railroads' $20 million investment in the Philadelphia Navy Yard).[15]

In its petition for reconsideration, DCED asks us to clarify that our discussion of those issues did not constitute a Board ruling that would have preclusive effect in any future proceeding as to whether CSX and NS have complied with their obligations under the letter agreements. DCED argues that such a ruling would be beyond the announced scope of this proceeding and would involve contractual disputes that can only be resolved by a court.

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[11] See id. at 87-94.

[12] Id. at 18.

[13] Id.

[14] Id. at 19.

[15] Id.

DISCUSSION AND CONCLUSIONS

A petition for reconsideration must show material error, new evidence, or changed circumstances. 49 CFR 1115.3. Because DECD's petition does not make such a showing, it will be denied. We will, however, clarify the relevant discussion in our prior decision.

The Request for Reconsideration. DCED claims that the Board did not provide adequate notice that we would give substantive consideration to the issue of compliance with the two letter agreements. But the public notice announcing the hearings was broad in scope, stating that the Board would consider "any matter connected with the Conrail Transaction."[16] And DCED itself made an issue of whether CSX and NS had complied with their obligations under the letter agreements.[17]

DCED argues that, in raising the noncompliance issue as grounds for continuing oversight, it was not asking the Board to "enforce" the letter agreements or to rule on the merits of whether or not CSX and NS have complied with them. It argues, in effect, that we should have **considered** its compliance issue but should not have **decided** whether that issue had merit. But in order for us to rule on DCED's request for continued oversight, we necessarily had to evaluate whether in our view it had presented adequate support for that request. In short, DCED asked us to consider the extent of the carriers' compliance as grounds for taking a regulatory action — continuing oversight over this merger transaction, and that is just what we did. Thus, our action was entirely foreseeable, given the arguments that DCED itself had put before us, and was clearly within the scope of the notice given.

DCED argues that for the Board to rule on contractual disputes is at odds with Board precedent.[18] However, the Board did not issue such a ruling here. While breach of contract allegations, which arise under contract law, should ordinarily be resolved by a court, claims that a carrier has violated a Board-imposed merger condition clearly belong here. DCED's argument here was that continued Board oversight was necessary because the alleged breach of the letter agreements was a violation of one of the conditions imposed by the Board in its approval of the Conrail

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[16] Oversight Dec. No. 12, slip op. at 2, 69 FR at 7665.

[17] See DCED comments filed April 26, 2004, at 1: "Our comments will be limited to one issue: the failure by both Norfolk Southern and CSX (such parties collectively, the 'Purchasers') to comply fully with their representations set forth in separate letter agreements, from Norfolk Southern and from CSX respectively, each dated October 21, 1997, addressed to the Governor of the Commonwealth of Pennsylvania and the Mayor of the City of Philadelphia (the 'City') and subsequently submitted for the record." DCED again raised the issue in its oral testimony (May 3, 2004) and in three written submissions (May 20, 2004, July 1, 2004, and August 26, 2004).

[18] See, e.g., Morristown & Erie Railway, Inc. — Modified Rail Certificate, STB Finance Docket No. 34054, slip op. at 3 (STB served June 22, 2004).

Transaction. Thus, it was entirely appropriate for us to consider whether and to what extent the carriers had failed to comply with the letter agreements in connection with our regulatory proceeding.

The Request for Clarification. DCED has asked us to clarify that our determination regarding the letter agreements will not have preclusive effect in any future proceeding, whether before us or in some other forum. Our assessment that CSX and NS have substantially honored their commitments is limited to the context and purpose for which that determination was made: to determine whether the compliance, or non-compliance, with the particular representations made by CSX and NS violated our merger condition and whether the carriers' actions warranted continued regulatory oversight by the Board under the provisions and standards set forth by the Interstate Commerce Act. Our decision did not make a determination whether, under Pennsylvania contract law, CSX's and NS's actions constituted a breach of contract. While our determination may be relevant in a future state law case involving the same or similar issues, our decision did not attempt to predetermine what weight or effect it might have in another context. Rather, any claim of issue preclusion will have to be addressed in the proceeding in which it arises.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for clarification is granted to the extent described in this decision.

2. The petition for reconsideration is denied.

3. This decision is effective on March 25, 2005.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary